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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

VITA PLANNING AND LANDSCAPE ARCHITECTURE, INC., Plaintiff and Appellant, v. HKS ARCHITECTS, INC., Defendant and Respondent.	A150525 (Marin County Super. Ct. No. CIV1300681)

After a bench trial, the trial court determined the statute of limitations barred Vita Planning and Landscape Architecture's (Vita) lawsuit against HKS Architects, Inc. (HKS).[1] It also declined to apply the equitable estoppel doctrine. The court entered judgment for HKS.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This dispute arises out of a failed attempt to build a luxury hotel in Mammoth Lakes. The project had two owners, C.E. Mammoth LLC (Mammoth) and Cypress Equities (Cypress). Mammoth hired HKS, a Texas corporation, to provide architectural

[1] References to Vita and HKS include their respective predecessors in interest. We incorporate the factual and procedural background from our opinion in Vita's prior appeal, *Vita Planning & Landscape Architecture, Inc. v. HKS Architects, Inc.* (2015) 240 Cal.App.4th 763 (*Vita I*), and recite only those facts relevant to the issues in this appeal.

services. HKS hired Vita, a Bay Area corporation, to provide landscape architecture design. In a written contract, HKS agreed to pay Vita $72,160 for design development work and $120,000 for construction documentation work. The contract contained a Texas forum selection clause, and a "pay if paid" clause, both of which are unenforceable in California. (See *Vita I, supra,* 240 Cal.App.4th at pp. 767, 770, fn. 3.)

In 2007 and 2008, Vita performed work pursuant to the contract and sent HKS invoices. The last invoice HKS paid was in December 2007. In June 2008, HKS instructed Vita to cease work on the project because Mammoth had stopped paying HKS. Work on the project was " 'placed on hold.' " In August 2008, Vita sent HKS the final invoice for work performed on the project. From 2008 to 2012, Vita regularly sent HKS statements showing the amount HKS owed.

Vita's Lawsuit

In February 2013, Vita filed a complaint against HKS. The operative first amended complaint alleged claims for breach of contract, unjust enrichment, quantum meruit, and breach of the implied covenant of good faith and fair dealing. The trial court granted HKS's motion to enforce the forum selection clause and dismissed the action. We reversed, concluding Code of Civil Procedure section 410.42 precludes out-of-state contractors from requiring California subcontractors to litigate certain contract disputes in the contractor's home state. (*Vita I, supra,* 240 Cal.App.4th at pp. 766–767.)

On remand, HKS moved for summary judgment, arguing the statute of limitations barred the lawsuit. The court denied the motion. It determined the four-year statute of limitations for written contracts did not, as a matter of law, bar the action. It also concluded Vita established a triable issue of fact as to whether HKS was equitably estopped from asserting the statute of limitations.

Bench Trial

Vita was represented by counsel when it negotiated the contract with HKS. The contract between HKS and Vita contained a pay if paid clause. In June 2008, HKS instructed Vita to cease working on the project because Mammoth had stopped paying HKS. HKS stated Vita would not get paid until HKS got paid. By that time, Vita's

owner knew there was a " 'pay when paid' clause" in the contract. As of July 2008, HKS owed Vita $205,872.50.

Throughout 2008, Vita sent additional copies of the invoices to HKS and inquired about payment. In June 2008, Vita emailed HKS regarding "outstanding invoices," noting Vita had not "received any payments for any of our invoices, which goes back to December 2007." Vita asked for "an expected payment date[.]" On August 1, 2008, Vita emailed HKS about "payment on this project," noting Vita's "receivable is pretty high and past due" and asking "[i]s there any assistance you can give us . . . ?" Several days later, Vita sent another copy of the balance due and asked HKS to "pass this on to accounting." Vita also sent HKS the final invoice for work performed on the project.

Vita emailed HKS again in September 2008: "checking in on the status of our outstanding invoices. The last time we talked you mentioned that the HKS Dallas office had a . . . relationship with Cypress and that possibly someone from that office could help with getting paid. We have a very large outstanding balance . . . and any progress with this would be helpful." HKS responded: "Get in line. Kidding." HKS explained that the lender was "holding the funds" and that HKS would tell Cypress, one of owners of the project, "that non payment is not acceptable and that our contract is with Cypress and not their lender." That same month, HKS sent Mammoth a demand for payment, which it forwarded to Vita.

In October 2008, Vita contacted HKS to check "in again on the latest word regarding [the] payments. Did HKS end up putting a [lien] on the project?" HKS responded: "We are walking that fine line between relationship and lawsuit. We have some options and at the same time are talking with Cypress on their efforts to get funds released. Bottom line, we're not any closer but have a demand letter in place that safeguards our position." In November, Vita emailed HKS: "Just checking in on our favorite dead beat client. Any forward motion on payment?" HKS responded, "I left the whole affair up to our Dallas office and have not heard anything in a month. I'll . . . see what has transpired . . . and [will] let you know."

In early March 2009, Vita told HKS it planned "on turning this matter over to our attorney" and asked for the contact information for HKS's counsel. A week later, Vita began collecting documents to use in litigation against HKS. Vita's attorney sent HKS a demand letter stating Vita "provided valuable landscaping architectural services and has billed for those services. These bills total approximately $225,000. To date HKS . . . has failed to make any payment . . . . [¶] Please contact me so that we may make arrangements to resolve this dispute and, thereby, avoid litigation." HKS responded, "our client has not paid HKS for the services provided by VITA. We have filed suit to collect unpaid fees, including those invoiced by VITA. If you would like to have information about that lawsuit, I will ask our counsel to get in touch with you." According to Vita's owner, HKS's response confirmed what Vita already knew—that Vita would not get paid unless HKS got paid. In a May 2009 letter, HKS advised Vita's counsel that "HKS has not received a partial payment from" Mammoth, and that HKS had "filed suit and expect to obtain a default judgment. We also intend to sue 'Cypress[.]' "

In early April 2010, HKS filed a lawsuit against Mammoth in Texas.[2] Later that month, Vita emailed the outstanding invoices to HKS with a note, "[p]lease let us know if there has been any movement on getting any of these invoices taken care of." HKS responded that "the client owes our firm over $1.2M and we have initiated a law suit. As information becomes available, I will pass it along." Vita asked, "Can you give me any details on the lawsuit? I am assuming that VITA's payables are also included." HKS replied, "I don't have the details but yes, VITA's covered in the lawsuit."

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[2] The court considered the petition HKS filed against Mammoth in Texas in April 2010, which attached HKS's contract with Mammoth. The court also considered the default judgment HKS obtained in August 2010. The default judgment states Mammoth was "duly and legally cited to appear and answer, failed to appear and answer, and wholly made default," and that the court had "read the pleadings and the papers on file, and is of the opinion that the allegations of plaintiff's petition have been admitted and that the cause of action is liquidated and proven by an instrument in writing, and finds that defendant is indebted to plaintiff in the sum of one million two hundred forty-one thousand seventy-two dollars and ninety-two cents ($1,241,072.92)" plus prejudgment interest and attorney fees.

In early August 2010, Vita's office manager told Vita's owner that HKS expected to get a judgment against Cypress but that HKS did not "expect to collect any money from Cypress, which probably means that Cypress has no assets." The office manager opined Vita had a "good shot at taking action against HKS" but that the company needed to decide "the value of our relationship with . . . HKS. We could ask them to sign a tolling agreement which would let them know that if they aren't able to collect any money from Cypress that we would subsequently file suit. We could withdraw the suit at anytime, but based on our statute of limitations we need to get something in place to preserve our rights. We probably need to make a decision in the next day or two." Vita's owner agreed to "go ahead but in a way that says we are really sorry to have to do this . . . . We may be able to use it as leverage perhaps to get another job."

On August 17, 2010, Vita emailed HKS "a recent statement" and asked for news on the lawsuit. HKS told Vita the lawsuit had "been filed and we're waiting on the process of discovery to begin." (On August 16, HKS obtained a default judgment against Mammoth.) Throughout 2010 and 2011, Vita sent HKS statements showing the amounts owed, to remind HKS of what Vita "considered to be a payment obligation," and that Vita would charge interest on the unpaid invoices. HKS did not challenge the amount Vita claimed was due. HKS never told Vita it would get paid irrespective of whether HKS received payment from Mammoth. HKS never promised to pay Vita out of proceeds from HKS's lawsuit against Mammoth. Instead, HKS refused to pay Vita until it received payment from Mammoth.

In January 2012, Vita asked for an update on the lawsuit. HKS informed Vita it had obtained a judgment against Mammoth but was unable to collect. Vita waited until February 2013 to file a lawsuit against HKS because Vita's owner wanted to preserve his relationship with HKS. Vita's owner acknowledged this was a "bad business decision." Vita's owner testified he thought HKS would pay Vita, because he thought HKS would receive payment from Mammoth. He explained, "I didn't want to initiate a lawsuit if there was a possibility of getting paid."

Vita argued HKS had owed Vita money since July 2008. HKS reasserted the statute of limitations defense; Vita argued equitable estoppel precluded HKS from invoking that defense. According to Vita, "HKS never told Vita it would unequivocally not be paid until January 2012. Vita relied on HKS's representations." HKS urged the court not to apply equitable estoppel, arguing Vita had the right to file a lien under the contract "at any time. They did not do so. We know they had attorneys involved. . . . [HKS] at no time made any representation, any guaranty that there would be any recovery from this Texas lawsuit. To the contrary, early on . . . well before four years [of] the filing of the lawsuit in 2013, it was clear that HKS was doing what it could to recover from the legal entities, CE Mammoth, . . . but there was no expectation. . . . This was a business . . . decision" made by Vita's owner to "engender a further relationship with HKS . . . . He made that decision. He took that risk. There is no basis for equitable estoppel."

Statement of Decision and Judgment

In a lengthy statement of decision, the court determined HKS breached the contract and Vita suffered damages. Next, the court concluded the four-year statute of limitations on Vita's claims began to run by September 2008. The court explained: "By June 20, 2008, Vita asserted to HKS that HKS had never paid any invoices dating back to December 2007. Also by that date Vita had submitted all invoices for all work it performed. In response to another inquiry about its unpaid invoices on September 16, 2008, HKS responded 'Get in line. Kidding[,]' and indicated it sought payment from Mammoth. Later that same month, HKS forwarded to Vita a notification that HKS had sent to Mammoth regarding a Demand for Payment letter HKS sent to Mammoth under separate cover. These are . . . examples of why Vita knew that HKS had taken the position that it would not pay Vita at least by September 2008."

In determining the statute of limitations barred the action, the court stated: "HKS made clear it would only pay Vita if it obtained payment from Mammoth (relying on the pay-if-paid clause in the contract). It responded to Vita's inquiries when Vita made them. It stated truthfully, when it obtained a default judgment, that it could not collect on that

judgment. In the meantime, Vita appears to have done nothing to protect its rights. It did not sue HKS. It offered no evidence that it sought or obtained a tolling agreement. It offered no evidence that it evaluated itself the odds of HKS recovering the full amount on which it had sued Mammoth. Although Vita is a small company, it is not entirely unsophisticated. It employed counsel to engage with HKS over the nonpayment in March 2009. It employed counsel to draft a complex acquisition agreement when it bought Insite. . . . Vita reasonably should have known the uncertainties of litigation and, hence, of payment from HKS."

The court rejected Vita's argument that HKS never made " 'an unequivocal statement' that HKS would not pay." According to the court, "HKS made clear it would only pay Vita if it, in turn, recovered the funds through its litigation efforts against Mammoth." Nor was the court persuaded by Vita's claim that "the pay-if-paid promise by HKS amounted to a condition precedent that blocked HKS' performance obligation to Vita." It explained the "invoices came due when issued, not when HKS said it would conditionally pay them *if* it recovered in full in its litigation efforts against Mammoth. Vita's conduct in continually seeking payment on the invoices confirms Vita's view that HKS owed the money at the time, not after its litigation against Mammoth concluded."

According to the court, the policy underlying the statute of limitations supported its application because HKS knew "Vita considered the invoices due and expected payment. On the other hand, neither party behaved as if Vita would pursue the claim. Vita did not keep payment records and no longer employed the people most involved in the project. It's primary witness . . . did not testify from personal knowledge but essentially had to recreate the payment history and present it as something of a custodian of records. Both parties (but especially HKS) pointed to the lack of available evidence and witnesses as hampering their trial presentation."

Next, the court declined to apply the equitable estoppel doctrine. It noted HKS represented "it sought to recover the funds it owed Vita in its litigation against Mammoth" but that equitable estoppel did not apply because "HKS said nothing false or misleading. Despite some ambiguity regarding whether HKS actually notified Mammoth

regarding the full extent of the Vita claim, Vita does not dispute the veracity of HKS' statements that it had sued and would attempt to recover, and then pay Vita, the funds. Thus, Vita identified no 'true' fact known by HKS that HKS concealed or mispresented about which Vita was 'ignorant.' As far as the court can tell, HKS told Vita exactly what it intended to do—recover from Mammoth if possible in litigation, then pay Vita. It did not recover from Mammoth in litigation and therefore did not pay Vita. HKS never said it guaranteed a recovery, or that it would pay whether it recovered or not. In short, it did not conceal or misrepresent anything. It just told Vita its plans and then followed those plans."

The court declined to apply equitable estoppel for the additional reason that Vita did not reasonably rely on HKS's communications about the Texas lawsuit. It determined "HKS told Vita it would pursue the funds through litigation. By March 2009, Vita had retained counsel and threatened litigation. It must have known that neither it nor HKS could predict a litigation result. Maybe HKS would not recover at all. Maybe it would recover only a portion. Litigation can end in any number of ways unfavorable to Vita's claim, as Vita and its counsel must have known. Yet Vita did not pursue its claim or even seek to enter into a tolling agreement. Vita chose instead to roll the dice on the outcome of litigation in a foreign state, controlled by someone else, about which it sought and had little information. Vita had that right, but choosing to do so does not then suspend the statute of limitations under equitable tolling principles."

It continued: "In addition, HKS had no right to condition payment from Mammoth on payment from HKS to Vita. HKS' entire rationale for not paying Vita during those years rested on a faulty legal premise—the enforceability of the pay-if-paid clause in the contract. Given the uncertainty of payment even on HKS' terms, and the legal insufficiency of those terms in the first place, Vita did not reasonably rely on the assurance that HKS sought payment from Mammoth then to pay Vita." As the court explained, "HKS told Vita it was 'covered' in the Texas litigation, meaning that if HKS recovered the amount it sought it would pay Vita's invoices. But it said nothing that would reasonably lead Vita to believe, and Vita offered no credible evidence that it did

believe, HKS would certainly obtain that recovery." The court entered judgment for HKS.

DISCUSSION

Vita contends the statute of limitations does not bar the lawsuit and that the court erred by declining to apply the equitable estoppel doctrine.

I.

The Statute of Limitations Bars the Lawsuit

Vita contends the court "erred in its analysis" of when the breach of contract claim accrued. When "a cause of action accrues is a question of fact" and a "trial court's finding on the accrual of a cause of action for statute of limitations is upheld on appeal if supported by substantial evidence."[3] (*Institoris v. City of Los Angeles* (1989) 210 Cal.App.3d 10, 17.) "When applying the substantial evidence test, 'the power of the appellate court begins and ends with a determination whether there is any substantial evidence, contradicted or uncontradicted, which supports the finding.' " (*Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187, 200.)

A. Substantial Evidence the Breach of Contract Claim Accrued by September 2008

The statute of limitations for breach of written contract "is four years from the time the claim accrues." (*Gilkyson v. Disney Enterprises, Inc.* (2016) 244 Cal.App.4th 1336, 1341.) A breach of contract claim "accrues at the time of breach, which then starts the limitations period running." (*Cochran v. Cochran* (1997) 56 Cal.App.4th 1115, 1120; *Church v. Jamison* (2006) 143 Cal.App.4th 1568, 1583.) "[B]reach of contract ordinarily occurs upon the promisor's *failure to render the promised performance*." (*McCaskey v. California State Automobile Assn.* (2010) 189 Cal.App.4th 947, 958.)

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[3] We review the court's accrual determination for substantial evidence because the facts—whether disputed or undisputed—are susceptible of more than one legitimate inference. (See *Pacific Shores Property Owners Assn. v. Department of Fish & Wildlife* (2016) 244 Cal.App.4th 12, 34 [de novo review appropriate if facts are "not in dispute or susceptible of more than one legitimate inference"].)

The court concluded the breach occurred in September 2008 because, by that date, HKS had refused to perform, i.e., pay Vita. Substantial evidence supports that conclusion. In June 2008, HKS told Vita to stop working on the project "because of non-payment" by Mammoth. By September 2008, Vita had ceased working on the project, had submitted all invoices for work performed, and had put HKS "on notice of [its] right to be paid" for invoices dating back to December 2007. By September 2008, Vita also knew the contract contained a pay if paid clause. And by that same date, Vita also knew HKS was not getting paid by Mammoth and that HKS would not pay Vita's invoices until it received payment from Mammoth, because HKS told Vita to "Get in line."

Vita may have had strategic business reasons to refrain from filing a lawsuit in September 2008—for example, its desire to preserve a business relationship with HKS and its belief that HKS might eventually receive payment from Mammoth—but those motivations do not mean Vita's breach of contract claim did not accrue by that date. (See *Davies v. Krasna* (1975) 14 Cal.3d 502, 514 [cause of action accrues where "plaintiff has suffered actual and appreciable harm"].) We conclude substantial evidence supports the court's finding that Vita's breach of contract claim accrued by September 2008. Vita's complaint, filed more than four years later, is barred by the statute of limitations. (Code Civ. Proc., § 337, subd. (a).)

B. Vita's Accrual Arguments Are Unavailing

Vita offers two seemingly contradictory positions on accrual: it argues its breach of contract claim never accrued, *and* that its claim did not accrue until it learned HKS's judgment in the Texas litigation was unenforceable. Neither argument is persuasive.

Vita's first argument that its claim *never* accrued because the pay if paid clause was a condition precedent that suspended the deadline for HKS to perform. And, according to Vita, there can be no breach " 'until the time specified . . . for performance has arrived.' " This argument defies logic and begs the question of how a party can prosecute a claim that has not accrued. In any event, Vita's reliance on the pay if paid clause is unavailing. The complaint alleged the parties had a contractual agreement wherein HKS "agreed to pay for services rendered by [Vita]" and that HKS breached the

contract by "failing and refusing to satisfy its obligation to pay . . . for [Vita]'s performance." If the pay if paid provision postponed the time for HKS's performance, then Vita's breach of contract claim would never accrue, because HKS has yet to receive payment from Mammoth. Pay if paid clauses are unenforceable in California for this reason—they operate as a condition precedent which may never occur if the general contractor does not receive payment from the owner. (See *Wm. R. Clarke Corp. v. Safeco Ins. Co.* (1997) 15 Cal.4th 882, 886–887; *Capitol Steel Fabricators, Inc. v. Mega Construction Co.* (1997) 58 Cal.App.4th 1049, 1057–1059.)

Vita's reliance on the pay if paid clause is unavailing even if the contract did not fix a time for HKS to pay Vita. Where a contract does not fix a time for payment, "a reasonable time within which to pay is inferred and that such reasonable time may be coincidental with the statute of limitations. [Citations.] The law implies that the contract shall be performed within a reasonable time . . . . Reasonable diligence and good faith must be required in such instances and it is the duty of the court to hear evidence and therefrom fix a time which would be fair." (*Pitzer v. Wedel* (1946) 73 Cal.App.2d 86, 91; see also Civ. Code, § 1657.) Here, the court heard the evidence and impliedly fixed a "reasonable time" for payment—no later than September 2008, after Vita ceased working on the project and submitted its final invoice for work performed, and after interest began to accrue on the unpaid invoices. (See *Johnstone v. E & J Mfg. Co.* (1941) 45 Cal.App.2d 586, 588.) Vita has not demonstrated the court's conclusion was erroneous or unsupported by the evidence.

Vita's second argument is the breach of contract claim was postponed until it learned HKS could not collect on the Texas judgment. This argument, which relies on out-of-state cases and the assertion that such a result is "good public policy," is not persuasive. Vita's other attempts to avoid the statute of limitations are unavailing. For example, Vita claims HKS acknowledged its debt to Vita in the Texas litigation, which tolled the statute of limitations for an unspecified period of time. We decline to consider this argument for the first time on appeal. The parties' disagreement over the effect of the Texas litigation "makes it less than clear that the issue would entail purely a question

of law. Moreover, the issue is one within our discretion, and we are not required to consider this new theory, even if it raise[s] a pure question of law." (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767.)

We reject Vita's contention that collateral estoppel bars HKS's "defensive use of the statute of limitations." Collateral estoppel precludes relitigation of an issue where, among other things, the issue was " 'actually litigated' " or " 'necessarily decided,' " in prior litigation. (*In re Marriage of Furie* (2017) 16 Cal.App.5th 816, 827–828.) The minimal record the Texas litigation does not demonstrate the statute of limitations issue was " 'actually litigated' " or " 'necessarily decided,' " in that litigation. (*Id.* at p. 828.)

C. Vita's Policy Argument is Not Persuasive

Vita contends the policy underlying "the statute of limitations would not be furthered by invoking it," because its breach of contract claim was not " 'stale.' " We are not persuaded. " 'Statute of limitations' is the 'collective term . . . commonly applied to a great number of acts,' or parts of acts, that 'prescribe the periods beyond which' a plaintiff may not bring a cause of action. [Citations.] It has as a purpose to protect defendants from the stale claims of dilatory plaintiffs. [Citations.] It has as a related purpose to stimulate plaintiffs to assert fresh claims against defendants in a diligent fashion. [Citations.] Inasmuch as it 'necessarily fix[es]' a 'definite period[] of time' . . . it operates conclusively across the board, and not flexibly on a case-by-case basis. [Citations.] That is to say, a cause of action brought by a plaintiff within the limitations period . . . is not barred, even if, in fact, the former is stale and the latter dilatory; contrariwise, a cause of action brought by a plaintiff outside such period is barred, even if, in fact, the former is fresh and the latter diligent." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 395–396.)

We cannot decline to apply the statute of limitations because Vita believes its claim is not stale, or because application of the limitations period is, according to Vita, "harsh." " 'Statutes of limitation "are, of necessity, adamant rather than flexible in nature" and are "upheld and enforced regardless of personal hardship." ' " (*California Standardbred Sires Stakes Com., Inc. v. California Horse Racing Bd.*

(1991) 231 Cal.App.3d 751, 756.)

II.

Equitable Estoppel Does Not Apply

Vita challenges the court's refusal to apply the equitable estoppel doctrine. Equitable estoppel empowers a court to allow a plaintiff to proceed with a time-barred claim because the defendant has engaged in inequitable conduct. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 383.) The doctrine applies only where the plaintiff establishes (1) the defendant was apprised of the facts; (2) the defendant intended its conduct to be acted upon, or acted so the plaintiff had a right to believe it was intended; (3) the plaintiff was ignorant of the true state of facts; and (4) the plaintiff relied upon the conduct to its injury. (*Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1785.) "The detrimental reliance must be reasonable." (*Schafer v. City of Los Angeles* (2015) 237 Cal.App.4th 1250, 1261.) " 'The existence of an estoppel is generally a factual question. [Citation.] Therefore, we review the trial court's ruling in the light most favorable to the judgment and determine whether it is supported by substantial evidence.' " (*Krolikowski v. San Diego City Employees' Retirement System* (2018) 24 Cal.App.5th 537, 565.)

The court determined equitable estoppel did not apply because HKS did not conceal information about the Texas litigation. This conclusion is well supported by the evidence. When Vita inquired about its unpaid invoices, HKS stated it had not been paid. HKS said it was pursuing payment from Mammoth and forwarded its demand letter. HKS told Vita it had filed a lawsuit against Mammoth. Later, HKS informed Vita it had obtained a judgment but that it could not collect. These statements were not false or misleading. The evidence supports a reasonable inference that Vita failed "to understand the accurate information [HKS] was providing." This is "not a case in which [Vita] was blindsided by misrepresentations or misstatements by [HKS]. Instead, [Vita] chose to ignore numerous accurate statements from [HKS]." (*Machavia, Inc. v. County of Los Angeles* (2017) 19 Cal.App.5th 1050, 1055–1056.)

In urging us to reach a different conclusion, Vita makes much of the parties' April 2010 email exchange, where Vita asked for information on whether there had "been any movement on getting any of these invoices taken care of." HKS responded "the client owes our firm over $1.2M and we have initiated a law suit." Vita asked for "details on the lawsuit . . . . I am assuming that VITA's payables are also included." HKS replied, "I don't have the details but yes, VITA's covered in the lawsuit." According to Vita, the comment that "VITA's covered in the lawsuit" was "misleading" information that lulled Vita into thinking its rights were protected. We disagree. The statement that Vita's invoices were included in the amounts HKS sought to recover in the Texas litigation was not a promise HKS would obtain that recovery.

The court also found Vita did not rely on the information that HKS provided about the Texas proceedings. Substantial evidence supports this factual determination. By March 2009, Vita had retained counsel and threatened to sue HKS. At trial, Vita's owner testified he waited until February 2013 to file a lawsuit against HKS because he wanted to preserve Vita's business relationship with HKS. Together, this evidence shows Vita did not wait to file a lawsuit because of HKS's statements regarding the Texas litigation. Substantial evidence supports the court's refusal to apply the equitable estoppel doctrine.[4]

DISPOSITION

The judgment is affirmed. HKS is entitled to costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

[4] We decline Vita's invitation to apply the equitable tolling doctrine because Vita did not raise this argument at trial. (*Saville v. Sierra College* (2005) 133 Cal.App.4th 857, 872–873.) The argument also fails on the merits because the plaintiff in the Texas litigation and the plaintiff in this litigation are different. (See *Reid v. City of San Diego* (2018) 24 Cal.App.5th 343, 360–361.)

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Jones, P.J.

WE CONCUR:

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Simons, J.

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Burns, J.

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